



Federal Highway Administration

23 CFR Part 645

[Docket No. FHWA-2019-0037]

RIN 2125-AF92

Broadband Infrastructure Deployment

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: FHWA amends its regulations governing the accommodation of utilities on the right-of-way (ROW) of Federal-aid or direct Federal highway projects to implement requirements of the Consolidated Appropriations Act, 2018, for broadband infrastructure deployment. The requirements, which will apply to each State that receives Federal funds under Chapter 1 of title 23, United States Code (U.S.C.), aim to facilitate the installation of broadband infrastructure.

DATES: This rule is effective [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: This document, the Notice of Proposed Rulemaking (NPRM), the supporting economic analysis, and the public comments received may be viewed online through the Federal eRulemaking portal at: <http://www.regulations.gov>. An electronic copy of this document may also be downloaded from the Office of the Federal Register's Website at <https://www.federalregister.gov> and the Government Publishing Office's Website at www.GovInfo.gov.

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SUPPLEMENTARY INFORMATION:

Background

Utility facilities, unlike most other fixed objects that may be present within the highway environment, are not owned nor are their operations directly controlled by State or local public agencies. Federal laws and FHWA regulations contained in 23 U.S.C. 109, 111, 116, and 123 and 23 CFR parts 1, 635, 645, and 710 regulate the accommodation, relocation, and reimbursement of utilities located within the highway ROW. State departments of transportation (State DOT) are required to develop Utility Accommodation policies that meet these regulations. 23 CFR 645.211.

Legal Authority, Statement of the Problem, and Regulatory History

The Consolidated Appropriations Act, 2018 (Pub. L. 115-141), Division P, Title VII (“MOBILE NOW Act”), Section 607, Broadband Infrastructure Deployment (47 U.S.C. 1504), directs the Secretary of Transportation to promulgate regulations to ensure that States meet specific registration, notification, and coordination requirements to facilitate broadband infrastructure deployment in the ROW of applicable Federal-aid highway projects. Accordingly, this rulemaking is required by statute. This regulation addresses the need to update FHWA regulations to implement the Section 607 requirements.

FHWA published a NPRM on August 13, 2020 (85 FR 49328), seeking public comment on proposed revisions to its regulations governing the accommodation of utilities on the ROW of Federal-aid or direct Federal highway projects to implement the Section 607 requirements. FHWA also requested public comments on an economic analysis summarized in the preamble to the proposed rule and presented in a supporting statement and a spreadsheet found in the rulemaking docket (FHWA-2019-0037).

FHWA received 30 public comment submissions. Commenters included several State DOTs, industry associations, associations of State and local officials, companies, and individuals. After carefully considering the comments received in response to the NPRM in light of the statutory requirements, FHWA is promulgating final regulations without changes to the proposed regulations.

Overview of the Final Rule

The final rule, which aims to facilitate the installation of broadband infrastructure, will apply to each State that receives Federal funds under Chapter 1 of title 23, U.S.C., including the District of Columbia and the Commonwealth of Puerto Rico. The MOBILE NOW Act defines the term “State” and other terms that are used in the final rule such as “appropriate State agency,” “broadband infrastructure,” and “broadband infrastructure entity,” as discussed in the preamble to the proposed rule. See 85 FR at 49329.

In § 645.307(a), FHWA sets out four new requirements of Section 607 of the MOBILE NOW Act. First, § 645.307(a)(1) requires that the State DOT, in consultation with appropriate State agencies, identify a broadband utility coordinator who is responsible for facilitating the infrastructure ROW efforts within the State.

Second, § 645.307(a)(2) requires the State DOT, in consultation with appropriate State agencies, to establish a registration process for broadband infrastructure entities that seek to be included.

Section 645.307(a)(3) requires the State DOT, in consultation with appropriate State agencies, to establish a process for electronically notifying broadband infrastructure entities identified under § 645.307(a)(2), on an annual basis, of the State Transportation Improvement Program (STIP) and providing other notifications as necessary. FHWA assumes that to comply with this provision, States will create an electronic notification process, update their utility accommodation policies to include this new process, and also

notify broadband companies of these changes, as discussed in the preamble to the proposed rule. See 85 FR at 49330.

Finally, § 645.307(a)(4) requires that the State DOT, in consultation with appropriate State agencies, coordinate initiatives under Section 607 of the MOBILE NOW Act with other statewide telecommunication and broadband plans and State and local transportation and land use plans, including strategies to minimize repeated excavations that involve broadband infrastructure installation in a ROW. FHWA assumes a statewide coordinator will carry out these responsibilities, as discussed in the preamble to the proposed rule. See 85 FR at 49330.

Section 645.307(b) contains the Section 607 of the MOBILE NOW Act provision that, if a State chooses to provide for the installation of broadband infrastructure in the ROW of an applicable Federal-aid highway project, the State DOT must ensure that any existing broadband infrastructure entities are not disadvantaged, as compared to other broadband infrastructure entities, with respect to the Section 607 program.

Consistent with Section 607 of the MOBILE NOW Act, § 645.309 provides that nothing in part 645, Subpart C, requires that a State install or allow the installation of broadband infrastructure in a highway ROW, and that nothing in part 645, Subpart C, authorizes the Secretary to withhold or reserve funds or approval of a Title 23 project.

Discussion of Comments Received in Response to the NPRM

FHWA received 30 public comment submissions in response to the NPRM. Commenters included several State DOTs, industry associations, associations of State and local officials, companies, and individuals. The following summarizes the comments received and FHWA's responses to the most significant issues raised in the comments.

General Comments

FHWA received general comments on the NPRM that do not concern specific provisions of the rule. The general comments covered commenters' views on the rule

and topics such as the rule's relationship to other regulations and authorities, timely implementation and compliance, suggested best practices, the eligibility of certain activities for Federal-aid funds, the need for the rule, the supporting economic analysis, and National Environmental Policy Act (NEPA) compliance.

Multiple commenters expressed support for the rule. Commenters cited the rule's potential to facilitate efficient broadband infrastructure deployment, including in rural areas, to complement efforts by other Federal entities, and to lay the groundwork for "smart roads" or other emerging applications. The commenters' support is noted.

One State DOT noted that the proposal broadly categorized all Broadband Facilities as utilities that are subject to 23 CFR part 645, which the commenter believed may be an unintended consequence of the rule.

This rule does not change the definition of the term "[u]tility" under 23 CFR 645.105. Further, under 23 CFR 645.209(m) regarding utility determinations, in determining whether a proposed installation is a utility, the most important consideration is how the State DOT views it under its own State laws and regulations.

One commenter suggested that language be added to the rule to require a State DOT implementing this subpart to abide by the provisions of Title 47 of the U.S.C. and various rules and regulations issued by the Federal Communications Commission (FCC) under title 47.

This rule meets the mandate provided by Congress in Section 607 of the MOBILE NOW Act. It does not change the applicability of other requirements enacted by Congress or promulgated by the FCC.

One commenter stated that FHWA should ensure that policies developed pursuant to this directive are implemented in a timely manner and comport with existing regulations regarding ROW fees for telecommunications infrastructure. Another

commenter suggested a 90-day deadline from the effective date of the final rule for States to achieve compliance.

While these comments emphasize the importance of implementing the final rule in a timely manner, including by providing a compliance date, other comments received on the NPRM state that implementing the final rule will involve additional responsibilities beyond existing practices and corresponding resources. FHWA appreciates both perspectives from the commenters and has included an effective date that is 90 days after the date of publication of the final rule in the *Federal Register*. This effective date acknowledges and reflects both the need for time to prepare to implement the final rule and the importance of timely implementation. Consistent with the statutory requirement codified at 47 U.S.C. 1504(c), § 645.303 provides that this subpart applies only to activities for which Federal obligations or expenditures are initially approved on or after the effective date of this final rule.

One State DOT requested more direction about the purpose and objectives of the requirement for Webinars. The State DOT also asked FHWA to allow State DOTs to hold as many or as few Webinars or other engagements as may be necessary to satisfy the State's goals for broadband infrastructure deployment in transportation ROW and the needs of the State's telecommunications providers.

In the preamble to the proposed rule, FHWA explained that it assumed, for purposes of the economic analysis for the proposed rule, that FHWA employees would prepare and present one external and one internal Webinar to explain the proposed requirements to State DOTs. See 85 FR at 49329-49330. The reference to Webinars was limited to FHWA's NPRM rollout and was not intended to suggest expectations for State DOTs going forward. Like the proposed rule, the final rule contains no requirements that State DOTs or others hold Webinars.

One commenter noted that the utility coordination personnel in each State should require subsurface utility engineering (SUE) for placement of broadband as a best practice.

This comment is outside the scope of this rulemaking, which implements the Section 607 requirements. Since 1991, however, FHWA has been encouraging the use of SUE on Federal-aid and Federal Lands Highway projects as an integral part of the preliminary engineering process. Utility coordination personnel may consider the use of SUE for placement of broadband.

One State DOT recommended that FHWA consider that broadband in ROW for roads, transit, and rail is vital for intelligent transportation systems (ITS) and other infrastructure management purposes. The commenter noted that in addition to offering benefits today, such data flow options can benefit future users of the infrastructure. Therefore, the commenter asserts that such projects could be eligible for Title 23 and Title 49 funds, where transportation purposes are carried out with such broadband infrastructure deployment in transportation ROW. Further, the commenter suggests that FHWA should encourage States to handle broadband infrastructure in a similar fashion as other utilities within the State.

FHWA appreciates the comment. This rule does not change any eligibilities for Title 23 or Title 49 funds as the underlying statutory authority does not make such a change. Moreover, each State has individual laws governing utilities. States continue to have the autonomy to implement or amend their laws to meet the requirements of this rule in a manner that fits with their existing practices and meets their needs and objectives.

One commenter noted concerns about match rates and installation of broadband because, the commenter stated, many rural areas and communities are struggling for funding and need to balance priorities. The commenter also mentioned that if rural areas

have limited communication capabilities, pedestrian issues and automated vehicle technologies will not be maximized in rural areas.

FHWA notes that the purpose of the rule, which implements Section 607 of the MOBILE NOW Act, is to facilitate deployment of broadband infrastructure, including in rural areas. However, the specific issues raised by the commenter are outside the scope of this rulemaking.

One State DOT commented that the requirements in this rule are not needed nor would they provide additional benefits for the deployment of broadband infrastructure on Federal-aid highways. The commenter added that the requirements appear to create or duplicate work as the State already has established efficient processes and strong relationships with utility partners including broadband companies in their State.

This rule satisfies the mandate provided by Congress in Section 607 of the MOBILE NOW Act. Further, the rule allows flexibility for States to use their existing processes to meet the requirements of this rule.

One commenter urged FHWA to reduce the assumed cost in the economic analysis because some States may already be in compliance. The commenter also suggested that cost savings, or economic benefits, of a Dig Once Policy should also be included in the economic analysis.

FHWA recognizes that some States already may be implementing some of the requirements of this rule. For example, in the Supporting Statement on the economic analysis for the proposed rule, FHWA noted that some States may add the broadband utility coordinator responsibility onto the role of an existing employee. However, FHWA lacks data and information on specific States' practices that would facilitate a more refined analysis. Although FHWA requested data and information to inform the economic analysis in the NPRM, FHWA did not receive relevant data or information.

As discussed in response to a comment on proposed § 645.307(a)(1), FHWA expects that the duties of a broadband utility coordinator are likely to vary across all States, but would be less than a full-time commitment. In the economic analysis for the final rule, FHWA assumes that roughly 50 percent of an employee's time might be taken up by performing the duties related to this provision, which represents the expected average burden of the broadband utility coordinator across all States.

Regarding the benefits of a Dig Once Policy, FHWA explained in the economic analysis for the proposed rule that the rule is expected to result in benefits from increased coordination between government agencies and broadband entities at different levels. FHWA expects this increased coordination generally would increase the efficiency of broadband projects and potentially result in fewer disruptions for area residents. FHWA, however, lacks the data and information needed to quantify these potential benefits. While FHWA in the NPRM requested data and information to inform the economic analysis, FHWA did not receive relevant data or information. Accordingly, FHWA acknowledges the potential benefits of a Dig Once approach on a qualitative basis.

One State DOT noted that the NPRM indicates the proposed rulemaking action is categorically excluded under 23 CFR 771.117(c)(1), and asked how FHWA made that determination.

This rule implements the requirements of section 607 of the MOBILE NOW Act (47 U.S.C. 1504) that are applicable to States that receive Title 23 Federal-aid highway funds. This rule does not involve and will not lead directly to construction. This rule establishes coordination, registration, and notification requirements that State DOTs will implement.

Comments on § 645.307(a)(1)

Multiple commenters expressed concern that the requirement to identify a broadband utility coordinator is an unfunded mandate.

For the reasons explained in the “Rulemaking Analyses and Notices” section of this preamble, this rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 109 Stat. 48).

Multiple State DOTs disagreed with FHWA’s estimates of the level of effort that is necessary to meet the rule’s requirements. These State DOTs estimate a significantly higher resource impact from this rule than that estimated by FHWA. In particular, some State DOTs commented that there will be increased administrative, coordination, and inventory needs as a result of this rule and that the broadband utility coordinator may need to have specialized expertise due to the nature of the broadband industry.

FHWA expects that it is likely the duties of a broadband utility coordinator will vary across all States, but would be less than a full-time employee (FTE) commitment. As discussed in the NPRM, FHWA assumed in the economic analysis for the proposed rule that 30 percent of an employee’s time would be utilized for these duties. After considering the public comments received in response to the NPRM and revisiting the time assumptions used in the economic analysis for the proposed rule, FHWA assumes that roughly 50 percent of an FTE’s time might be utilized for the duties related to the broadband utility coordinator provision. This represents the estimated average burden of the broadband utility coordinator position across all States. FHWA has revised the economic analysis for the final rule to reflect the 50 percent assumption.

Two State DOTs sought clarification on “efforts within the State” and suggested that “ROW” be specifically confined to transportation ROW.

The language in the final rule tracks the statutory language in Section 607 of the MOBILE NOW Act. The efforts in each State to implement the final rule may vary based on State law, policies, and practices for broadband infrastructure deployment.

One State DOT stated that more specificity regarding the duties of broadband utility coordinator may be helpful.

FHWA has not defined the duties of the broadband utility coordinator in this regulation in order to allow for any flexibility States may need to implement this regulation.

One State DOT asked to what extent are the other appropriate State agencies to have approval pertaining to the selection of the coordinator, who is to identify the other State agencies for consultation, and what level of documentation FHWA will require to verify that consultation has occurred.

Aside from providing for a State DOT's consultation with appropriate State agencies, the final rule does not include requirements relating to such agencies. Each State has flexibility to identify the other State agencies and to establish any other requirements or procedures, such as the level of documentation of consultation, to implement this regulation.

One State DOT asked whether, if the broadband utility coordinator resides in another agency besides the State DOT, Federal funds could be used to reimburse time and expenses of that coordinator and what documentation would be required.

This rule does not change any eligibilities for Title 23 funding consistent with governmentwide administrative requirements and cost principles in 2 CFR part 200.

One State DOT asked if FHWA will provide a list of minimum requirements that a non-DOT coordinator should possess concerning knowledge and understanding of the Federal guidelines concerning utilization of the ROW.

The final rule does not include such requirements and FHWA does not anticipate establishing such requirements. Rather, each State retains flexibility to determine the minimum requirements needed to implement this regulation.

Comments on § 645.307(a)(2)

FHWA also received comments on § 645.307(a)(2), which requires a State DOT, in consultation with appropriate State agencies, to establish a process for the registration of broadband infrastructure entities.

Multiple commenters asked that flexibility be given to allow States to rely on existing processes, avoid unnecessary duplication of effort, and limit the wasteful expenditure of limited State resources.

FHWA generally agrees with the commenters' suggestion. The final rule reflects the statutory requirements of Section 607 of the MOBILE NOW Act (47 U.S.C. 1504) but allows States flexibility to rely on existing processes and avoid duplication of efforts to meet the requirements.

One State DOT requested clarification on the purpose and meaning of “registration of broadband infrastructure entities” and “goals”. The comment suggested that FHWA define “goals” with specific criteria.

Consistent with Section 607 of the MOBILE NOW Act, the final rule in § 645.307(a)(2) requires a State DOT to establish a process for the registration of broadband infrastructure entities that seek to be included in broadband infrastructure ROW facilitation efforts within the State. The final rule in § 645.307(a)(3) requires a State DOT to establish a process for electronically notifying broadband infrastructure entities of the STIP annually and as necessary to achieve the goals of the rule. FHWA has not included more specific goals or criteria in the rule in order to allow State DOTs the flexibility to implement this rule consistent with their respective State laws, policies, and practices.

One commenter requested clarification that the definition of “broadband infrastructure entity” is not limited to private companies but also includes any formal or informal entity serving broadband. As examples of such entities, the commenter cited municipal, State, and Tribal governments or agencies, associations of governments or

agencies or intergovernmental bodies, rural electric cooperatives or public utilities, public-private partnerships, and non-profits.

Under 47 U.S.C. 1504(a)(3) and § 645.305, the term “broadband infrastructure entity” means any entity that (A) installs, owns, or operates broadband infrastructure; and (B) provides broadband services in a manner consistent with the public interest, convenience, and necessity, as determined by the State. States have flexibility to determine which entities fit within this definition.

One State DOT asked for clarification regarding the registration process for broadband infrastructure entities that seek to be included. Specifically, the commenter asked whether FHWA will provide a list of qualifications that are necessary for a company to become registered, whether the broadband coordinator will handle the registration process and maintain the registration, whether the list of registered companies is disclosable under public records requests, and whether only registered broadband infrastructure entities will be permitted to occupy the State ROW.

States have flexibility to determine which entities fall within the definition of the term “broadband infrastructure entity” in 47 U.S.C. 1504(a)(3) and any qualifications such entities need to have. States also have flexibility to establish a process, or use an existing process, for registration. Public records requests will be subject to applicable State laws, regulations, and policies. This rule does not require that only registered broadband infrastructure entities be permitted to occupy the State ROW.

Comments on § 645.307(a)(3)

Several comments concerned § 645.307(a)(3), which requires that a State DOT, in consultation with appropriate State agencies, establish a process to notify electronically broadband infrastructure entities identified under § 645.307(a)(2) of the STIP on an annual basis and provide additional notifications as necessary to achieve the goals of 23 CFR subpart C.

One State DOT recommended that FHWA place additional emphasis for States to utilize the STIP and States' other medium- and long-range planning activities to convey Dig Once type opportunities to telecommunications companies as they plan and fund their construction of broadband.

Under the final rule, States have flexibility to establish a process, or use an existing process, to implement the registration and notification requirements. States may choose to convey Dig Once opportunities in connection with their STIP or their planning activities as they implement those requirements, and FHWA encourages States to do so.

One commenter stated that to facilitate general notification as required by the rule, FHWA should encourage States to maintain publicly accessible databases of ongoing projects along with any third-parties that have been contracted to review applications for projects. A database, maintained on a deemed consented basis, would allow for self-policing of potential conflicts and increase accountability for these projects, the commenter added.

States have flexibility to establish a process, or use an existing process, to implement the registration and notification requirements.

One State DOT asked why, since the STIP is made available for review and comment via electronic and other means, broadband infrastructure entities must be provided a separate, exclusive notice that is not necessarily afforded to other sectors of the public.

This rule implements the mandate provided by Congress in Section 607 of the MOBILE NOW Act and codified at 47 U.S.C. 1504(b)(1)(C).

One State DOT asked if "other notifications" will be determined by the broadband utility coordinator and if metropolitan planning organizations (MPO) also will be required to notify broadband entities annually of the metropolitan transportation improvement programs.

Again, States have flexibility to establish a process, or use an existing process, to implement the registration and notification requirements, as well as to shape the role of the broadband utility coordinator. This rule applies to each State that receives funds under Chapter 1 of Title 23, U.S.C., including the District of Columbia and the Commonwealth of Puerto Rico. 47 U.S.C. 1504(b)(1); 23 CFR 645.303. It does not apply to MPOs.

One State DOT noted that for a Dig Once program to be most effective, broadband entities would have to be required to register and then actively participate in the program. The commenter asserted that industry so far has shown no interest in joint trenching or Dig Once types of voluntary programs and that without more willingness on the part of industry, a proactive notification system prescribed by this rule would not be significantly more effective than the State DOT's current notice approach where the data on projects is posted and updated on their website.

In Section 607 of the MOBILE NOW Act, Congress required FHWA to issue regulations that ensure that a State DOT, in consultation with appropriate State agencies, establishes a registration process for broadband infrastructure entities that seek to be included in broadband infrastructure ROW facilitation efforts within the State. The final rule adopts the language of Section 607 as proposed but does not establish additional requirements. Nothing in the final rule limits a State's ability to adopt additional registration requirements consistent with the regulation adopted through this rulemaking.

Comments on § 645.307(a)(4)

In addition, FHWA received comments on § 645.307(a)(4), which requires that a State DOT, in consultation with appropriate State agencies, coordinate initiatives carried out under this subpart with other statewide telecommunication and broadband plans and State and local transportation and land use plans, including strategies to minimize

repeated excavations that involve the installation of broadband infrastructure in a right-of-way.

One commenter appreciated the need to work with other State agencies to coordinate a Dig Once program, but felt that a mandate, instead of guidance, from the Federal government goes too far. Another commenter stated that many cities already have a Dig Once policy and coordinate with utilities frequently, calling for fewer requirements and streamlining the delivery of Federal highway projects.

Congress expressly required FHWA to promulgate regulations containing this requirement. This rule meets the mandate in Section 607 of the MOBILE NOW Act. States have flexibility to establish a process, or use an existing process, to meet the requirements of this rule, and States' processes may include streamlining the delivery of Federal highway projects.

Two commenters stated that FHWA should require States to adopt registration processes that are streamlined, efficient, and non-duplicative, and provide States guidance on strategies that minimize repeated excavations while preserving other laws and policies that promote infrastructure deployment.

FHWA has not included such requirements in the final rule. While FHWA generally supports streamlined, efficient, and non-duplicative processes and strategies, FHWA believes that States are well-positioned to determine their own appropriate approaches. Accordingly, States have flexibility to establish a process or strategy, or use an existing process or strategy, to meet the requirements of the final rule.

One State DOT stated that strategies to minimize repeated excavation of broadband infrastructure and other utilities are unsuccessful, and that broadband and communications companies are on their own schedule mainly due to customer demand and available budgets. The State DOT noted that while every effort is made to minimize repeated ROW excavations, it would be unfair to any broadband company to exclude

them from installing infrastructure in the same corridor simply on the basis that a competitor installed its infrastructure weeks, months, or perhaps the year before they did.

States have the flexibility to establish a process, or use an existing process, to meet the requirements of the final rule. Also, under § 645.309, nothing in this rule requires that a State install or allow the installation of broadband infrastructure in a highway ROW.

One commenter recommended that certain best practices be implemented to ensure no undue delays are experienced in minimizing repeated excavations, Federal regulations for ROW access fees are followed, and transparency is provided by any third-party entities contracted by the State. The commenter added that FHWA should use this rulemaking as an opportunity to encourage efficient processes like micro trenching.

The final rule implements the requirements in Section 607 of the MOBILE NOW Act (47 U.S.C. 1504) but does not establish additional requirements. Nor does this final rule change the applicability of any other Federal regulations. States have flexibility to establish a process, or use an existing process, to meet the requirements of this rule and to encourage best practices that they consider appropriate.

One State DOT stated that it anticipates difficulties resulting from a lack of jurisdiction and control over sister agencies or Local Public Agencies to obtain or have ready access to documents such as local land use plans. The State DOT would like clarification regarding “consultation with appropriate State agencies” and the expectation of formality, frequency and decisionmaking authority.

Consistent with Section 607 of the MOBILE NOW Act, the final rule requires that State DOTs, in consultation with appropriate State agencies, carry out the requirements of this rule. The final rule does not specify requirements for formality, frequency, and decisionmaking authority. Rather, each State DOT has flexibility to implement this rule under its own State laws, regulations, policies, and procedures.

One State DOT asked if the broadband coordinator is supposed to request all plans and strategies from broadband infrastructure entities and whether those plans and strategies are subject to disclosure under a public records request.

The intent of this section is to minimize excavations through project planning and coordination with other statewide broadband and land use plans. However, the final rule does not specify the duties of the broadband utility coordinator. States have flexibility to establish a process, or use an existing process, to meet the requirements of this rule and to determine the role of the broadband utility coordinator. Public records requests will be subject to applicable State laws, regulations, and policies.

One State DOT asked if a State DOT contractor's claims of construction delays or damage would increase if broadband entities are allowed to work within an active roadway construction project implemented by the State DOT contractor. They asked how this would impact the State DOT contractor's bond and what liability might the State DOT or its contractor assume for the broadband company working within the State DOT contractor's traffic control limits.

Utility work is commonly done within the project limits of an active roadway construction project. However, the final rule does not address the issues raised in the comment. They are outside the scope of this rulemaking.

Comments on § 645.307(b)

One State DOT requested clarity on the use of the terms “existing” and “disadvantaged” to assist States in determining how broadly the terms are defined.

The final rule implements the requirements of and uses the language in Section 607 of the MOBILE NOW Act. The final rule does not define these terms. States have flexibility to interpret these terms to meet the requirements of this rule. Nothing in this rule prohibits the installation of additional broadband facilities where facilities already exist.

One State DOT recommended that FHWA provide additional guidance and clarity on how to ensure existing entities are not disadvantaged with respect to the Section 607 program while also ensuring no broadband entity receives exclusive access to ROW. The rules should explicitly allow State DOTs to deny access based on physical, financial, operational, and safety constraints, the commenter recommended.

Nothing in the final rule or 23 CFR part 645 requires a State DOT to install or allow to be installed broadband infrastructure. Further, 23 CFR part 645, Subpart B, Accommodation of utilities, applies to the installation of utilities within the Federal-aid ROW such that the use and occupancy of the highway ROW does not adversely affect highway or traffic safety, or otherwise impair the highway or its aesthetic quality, and does not conflict with the provisions of Federal, State, or local laws or regulations.

One commenter stated that while they support this proposal, it lacks instruction on the selection of the broadband provider beyond requiring that the State DOT ensure that any existing broadband infrastructure entities are not disadvantaged, as compared to other broadband infrastructure entities, with respect to the Section 607 program. The single sentence instruction is simply insufficient to safeguard against gaming the system or politics dictating the process of selection of providers, the commenter added, and this lack of instruction could result in State monopolies for service providers that may not be providing the greatest benefit to the public.

Neither Section 607 of the MOBILE NOW Act nor the final rule requires a State to select a broadband infrastructure provider.

One commenter suggested adding that any third-party administrator contracted by a State DOT to facilitate broadband infrastructure deployment should not have a conflict of interest in administering access to the ROW (e.g., a subsidiary relationship to one broadband infrastructure entity that could affect competitors).

Each State has flexibility to determine the minimum requirements needed to meet this regulation.

Comments on § 645.309

One State DOT noted that it seems contradictory to require and implement this rule if broadband infrastructure installation is not allowed on State highways.

This rule meets the mandate provided by Congress in Section 607 of the MOBILE NOW Act. Nothing in this rule requires that a State install or allow the installation of broadband infrastructure in a highway ROW.

One State DOT asked with regard to § 645.309, whether there are penalties or other consequences that FHWA may impose on State DOTs for not complying with Subpart C.

Consistent with 47 U.S.C. 1504(c), § 645.309 provides that nothing in this subpart authorizes the Secretary of Transportation to withhold or reserve funds or approval of a project under Title 23 of the U.S.C.

One State DOT asked what consequence FHWA may impose on a State DOT if the coordinator residing in another agency fails to meet the broadband deployment goals, or performance measures that may be enacted in the future.

Consistent with 47 U.S.C. 1504(c), § 645.309 provides that nothing in this subpart authorizes the Secretary to withhold or reserve funds or approval of a project under Title 23 of the U.S.C.

Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures

The Office of Management and Budget (OMB) has not designated this rule a significant regulatory action under section 3(f) of Executive Order (E.O.) 12866.

Accordingly, OMB has not reviewed it. This action complies with E.O. 12866 and 13563 to improve regulation. FHWA anticipates that the rule would not adversely affect, in a material way, any sector of the economy. In addition, the rule would not interfere with any action taken or planned by another agency and would not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. The rule also does not raise any novel legal or policy issues.

The following is a summary of the results of the economic analysis for this rule. A supporting statement and a spreadsheet in the rulemaking docket (FHWA-2019-0037) contain additional details.

As discussed in the “Discussion of Public Comments Received in Response to the NPRM” section of the preamble, FHWA revised the economic analysis for the proposed rule in light of comments received suggesting that the required broadband utility coordinator position would take up more than 30 percent of a State employee’s time, as FHWA assumed at the proposed rule stage. FHWA still expects that the duties of a broadband utility coordinator are likely to vary across all States, but that they would be less than a full-time commitment. For the final rule, though, FHWA assumed that roughly 50 percent of an employee’s time might be taken up by performing the duties related to this provision, which represents the expected average burden of the broadband utility coordinator across all States.

With this revised assumption, the economic impacts of the final rule that FHWA is able to quantify are the costs that the rule would impose on States, and also on FHWA. The rule would result in total 10-year costs of \$37.1 million or \$30.7 million in 2018 dollars at discount rates of 3 percent or 7 percent, respectively. On an annualized basis, the rule would result in \$4.3 million or \$4.4 million in costs at 3 percent and 7 percent discount rates, respectively, and again in 2018 dollars. The costs of the proposed rule are primarily borne by States, with less than 1 percent of the total costs

accruing to FHWA, and the remaining more than 99 percent of costs accruing to States. Based on the estimated economic impacts and the other criteria for a significant regulatory action under section 3(f) of E.O. 12866 and as supplemented by E.O. 13563, this rule is not a significant regulatory action.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601-612), FHWA has evaluated the effects of this rule on small entities and has determined that the action is not anticipated to have a significant economic impact on a substantial number of small entities. The rule affects States, and States are not included in the definition of small entity set forth in 5 U.S.C. 601. The rule would also affect broadband entities, but the impact on these entities is expected to be beneficial and also to involve potential cost savings. The rule is thus not expected to result in increased costs for broadband entities. Therefore, FHWA certifies that the action will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 109 Stat. 48). This rule would not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$155 million or more in any one year (2 U.S.C. 1532). In addition, the definition of “Federal Mandate” in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or Tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government. The Federal-aid highway program permits this type of flexibility. Finally, this rule only implements requirements specifically set forth in statute.

Executive Order 13132 (Federalism Assessment)

This rule has been analyzed in accordance with the principles and criteria contained in E.O. 13132, and FHWA has determined that this rule would not have sufficient federalism implications to warrant the preparation of a federalism assessment. FHWA also has determined that this rule would not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions.

Executive Order 13175 (Tribal Consultation)

FHWA has analyzed this rule in accordance with the principles and criteria contained in E.O. 13175, "Consultation and Coordination with Indian Tribal Governments." The rule implements statutory requirements that apply to States that receive Title 23 Federal-aid highway funds, and it would not have substantial direct effects on one or more Indian Tribes, would not impose substantial direct compliance costs on Indian Tribal governments, and would not preempt Tribal laws. Accordingly, the funding and consultation requirements of E.O. 13175 do not apply and a Tribal summary impact statement is not required.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 et seq.), Federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or require through regulations. FHWA has determined that this rule does not contain collection of information requirements for the purposes of the PRA.

National Environmental Policy Act

The Agency has analyzed this rulemaking action pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and has determined that it is categorically excluded under 23 CFR 771.117(c)(1), which applies to activities that do not involve or lead directly to construction. Categorically excluded actions meet the

criteria for categorical exclusions under the Council on Environmental Quality regulations and under 23 CFR 771.117(a) and normally do not require any further NEPA approvals by FHWA. This rulemaking includes in FHWA regulations the coordination, registration, and notification requirements of 47 U.S.C. 1504 that are applicable to States that receive Title 23 Federal-aid highway funds. This rulemaking does not involve and will not lead directly to construction. FHWA does not anticipate any environmental impacts, and there are no unusual circumstances present under 23 CFR 771.117(b).

Executive Order 12898 (Environmental Justice)

E.O. 12898 requires that each Federal Agency make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minorities and low-income populations. FHWA has determined that this rule does not raise any environmental justice issues.

Regulation Identification Number

A Regulation Identification Number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 23 CFR Part 645

Grant programs-transportation, Highways and roads, Reporting and recordkeeping requirements, Utilities.

Issued under authority delegated in 49 CFR 1.81 and 1.85 on:

In consideration of the foregoing, FHWA amends part 645 of title 23 of the CFR as set forth below:

PART 645—UTILITIES

1. Revise the authority citation for part 645 to read as follows:

Authority: 23 U.S.C. 101, 109, 111, 116, 123, and 315; 47 U.S.C. 1504; 23 CFR 1.23 and 1.27; 49 CFR 1.48(b); and E.O. 11990, 42 FR 26961 (May 24, 1977).

2. Add subpart C to read as follows:

Subpart C—Broadband Infrastructure Deployment

Sec.

645.301 Purpose.

645.303 Applicability.

645.305 Definitions.

645.307 General requirements.

645.309 Limitations.

Subpart C—Broadband Infrastructure Deployment

§ 645.301 Purpose.

To prescribe additional requirements to facilitate the installation of broadband infrastructure pursuant to 47 U.S.C. 1504.

§ 645.303 Applicability.

This subpart applies to each State that receives funds under Chapter 1 of Title 23 of the U.S.C. and only to activities for which Federal obligations or expenditures are initially approved on or after the effective date of this subpart.

§ 645.305 Definitions.

For purposes of this subpart, the terms defined in 47 U.S.C. 1504(a) shall have the same meaning where used in these regulations, notwithstanding other provisions of this part or Title 23 of the U.S.C.

§ 645.307 General requirements.

(a) A State department of transportation, in consultation with appropriate State agencies, shall:

(1) Identify a broadband utility coordinator, whether in the State department of transportation or in another State agency, that is responsible for facilitating the broadband infrastructure right-of-way efforts within the State. The broadband utility coordinator may have additional responsibilities.

(2) Establish a process for the registration of broadband infrastructure entities that seek to be included in those broadband infrastructure right-of-way facilitation efforts within the State.

(3) Establish a process to notify electronically broadband infrastructure entities identified under subsection (2) of the State Transportation Improvement Program on an annual basis and provide additional notifications as necessary to achieve the goals of this subpart; and

(4) Coordinate initiatives carried out under this subpart with other statewide telecommunication and broadband plans and State and local transportation and land use plans, including strategies to minimize repeated excavations that involve the installation of broadband infrastructure in a right-of-way.

(b) If a State chooses to provide for the installation of broadband infrastructure in the right-of-way of an applicable Federal-aid highway project under this section, the State department of transportation shall carry out any appropriate measures to ensure that any existing broadband infrastructure entities are not disadvantaged, as compared to other broadband infrastructure entities, with respect to the program under this section.

§ 645.309 Limitations.

Nothing in this subpart establishes a mandate or requirement that a State install or allow the installation of broadband infrastructure in a highway right-of-way. Nothing in

this subpart authorizes the Secretary to withhold or reserve funds or approval of a project under Title 23 of the U.S.C.

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